Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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60 pp

QUESTIONS PRESENTED

1) Are damages under the Petroleum Marketing Practices Act limited by the contract term where the franchisee is driven from the station and it is given to another by the private act of the franchisor and that other party ?

2) Does the pre-emption of 15 U.S.C. 2806 (a) or does it not preclude overlapping tort actions with separate damages ?

3) Are exemplary damages under the PMPA limited to the those that are simply "wilfull" or do they include those where there is "wilfull disregard" of the Act or the rights of the franchisee thereunder as stated in the Act ?

4) Is there a doctrine of waiver or estoppel under the PMPA ?

5) May a franchisor create a situation barring further contract performance by a franchisee and then use that to limit its own damages for an illegal termination and nonrenewal under the PMPA ?

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STATUTES, RULES

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DIGESTS, TREATISES

*"Pre-emptive Scope of §106(a)
of Petroleum Marketing
Practices Act (15 U.S.C.
2806(a))" 103 ALR Fed 698 46

*Indicates authority principally
relied upon

THANH VONG HOAI,
Petitioner,

v.

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

Petition For The Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this matter on March 9, 1994, rehearing denied May 25, 1994.

OPINIONS BELOW

The opinions below were not reported. They are all reproduced in the appendix. An interlocutory appeal won by petitioner which is not before this Court was reported: Haoi v Sun Refining and Marketing, Inc.. (CA DC 1989) 866 F2d 1515.

JURISDICTION

Petition for rehearing was denied May 25, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petroleum Marketing Practices Act, Part I, 15 U.S.C. 2801 et seq. set out in the appendix and §§ 225 and 226(b) of the D.C. Retail Service Station Act, also set out in the appendix.

STATEMENT OF THE CASE

This is a dealer's suit under the Petroleum Marketing Practices Act, (PMPA) 15 U.S.C. 2801 et seq., ("the Act"). It was brought pursuant to the enforcement provisions of 15 U.S.C. 2805 for an "improper termination"[1] by which Thanh Vong

[1]Hoai had previously been a dealer for Sun at another location in Greenbelt, Maryland. Att. to complaint, Greenbelt documents, App. pp. This is important because by 15 U.S.C. 2803 (b)(1)(B) it means that Hoai was a franchisee governed exclusively by 15 U.S.C. 2802 and not a trial franchisee governed by 15 U.S.C. 2803 despite pronouncements by the district court and Sun to the contrary throughout the proceedings.

Hoai's (rhymes with joy) "business was destroyed and his business reputation and livelihood severely damaged". Hoai alleged in the alternative that his franchise was nonrenewed and claimed compensatory damages of thirty million dollars for a twenty year business. Hoai also asked for a "declaratory judgment that the act prevents disorderly transfers in violation of its terms in which franchisors knowingly cooperate with wrongdoers and tortfeasors who they well know are engaging in fraud and extortion."

The respondent, defendant below, is Sun Refining and Marketing Company, Inc. (Sun or Sunoco) The illegal termination, as to which Hoai was granted summary judgment on liability alone, (App. 7 ff.) was accomplished in an unusual way not similar to other reported cases under the Act but which brings up significant issues under the Act which are worthy of review:

Sun had encouraged Hoai to regain control of his station which he had informed them had been taken over by a fellow Vietnamese, one Vo, who was threatening Hoai with murder and bodily harm. Vo had taken control of the station after its opening on April 10, 1986. Vo purported to be a fellow Vietnamese businessman making a friendly loan for half of start up capital. The loan was revealed as fraudulent by the return of a check for insufficient funds which had been drawn on the station account which Vo was controlling. Hoai learned of this from Prendergast, a Sun financial officer in Philadelphia, who notified Hoai that the check had to be made good and that credit terms would be altered. When Hoai confronted Vo and Vo's

colleague Thach, the threats of physical violence began.[2]

Ultimately Hoai, under threat, was forced to sign a one page document. Subsequently Vo and his colleague Thach added two pages to it which Hoai was not shown, with differing page number references showing that it appeared on its face to be fabricated from differing documents, in which Vo purported to buy the business for one dollar. Hoai never had even the single page prior to litigation and thus did not submit it to Sun for approval. He did inform Sun of the threats and duress and his desire to keep his franchise and oust Vo and received their encouragement

[2]These issues have never been allowed to reach the merits in any court. Hoai's testimony on them was allowed in one TRO hearing in 1986 in the Superior Court, discussed herein. Vo was present and declined to testify as he did in the trial of this case. Thus the contention that this matter is much litigated is a bit misleading if it is meant to indicate that the merits of these contentions have been reached. They have not.

and support to rectify the situation and oust Vo as was attested to by Peele, Vaughn and others from Sun.

Hoai reentered the station, on Pennsylvania Avenue, S.E., in the District of Columbia, August 25, 1986. He had with him his then attorney, John D. Hemenway and one of Hemenway's sons. They carried a notice to quit the premises similar to those required of landlords under D.C. Code 45-1401 et seq. Vo was away from the station at the time. The employees who were there left. There were police officers present the entire time who attested to the peacefulness of Hoai's return. Vo's attorney and a colleague, Thach, appeared. A settlement of the dispute was agreed to whereby the parties would abide by the word of Sun's area representative, Ernest Peele, who was to come to the station the following day. An inventory was to be taken and whichever

party was not the dealer was to pay the other for funds expended.

The next day Peele came and declared that Hoai was Sun's dealer. Vo did not abide by the agreement. Instead he filed preemptively against Hoai, the Hemenways and Sun in the Superior Court of the District of Columbia, alleging various torts such as interference with contract, etc. He simultaneously requested a TRO. At the TRO hearing the Superior Court judge sua sponte introduced the concept of the tort of wrongful eviction, requested Vo to amend his complaint to include that tort, issued a 10 day TRO barring Hoai from the station and gave it to Vo. She ignored the testimony of Hoai, Peele and the Hemenways as to violence and threats. Vo was present but did not testify. Nor did he present any other witnesses. His atttorneys testified for him with the encouragement of the judge and were only too

happy to accede to her desire to have Hoai, the Hemenways and Sun have committed, if only for 10 days, the tort of wrongful eviction. She promised Hoai he would have a hearing in 10 days to straighten out those and other matters.

That hearing was never held, however. Instead Sun[3] chose on September 8, 1986, at the end of the TRO period, to enter into a consent order with Vo without any notice to Hoai. This was done on the advice of Vo's counsel that it would be a way to avoid a preliminary injunction hearing under Rule 65.[4] Hoai and the Hemenways and their counsel were never informed of this matter until it had been

[3]Sun could have simply moved to dismiss under D.C. Code 10-226 (b) as all Vo's complaints against Sun were based on the idea that Sun had refused transfer of the franchise to him under the one dollar contract which Hoai had never submitted to Sun for approval but which he had told them about as having been coerced from him.

[4]For all practical purposes Rule 65 of the Rules of the Superior Court of the District is the same as Federal Rule 65.

entered into between Vo and Sun, filed in the Superior Court and signed by a judge sitting as an emergency judge in chambers.[5] Only then was the consent order served upon counsel for Hoai and the Hemenways. It is this consent order which Hoai sued upon in this case as the act of illegal termination of his franchise which destroyed his business and business reputation and with regard to which he sought damages both compensatory and punitive and a declaratory judgment.

A little less than a year later Hoai filed the present suit. Sun moved to dismiss and the district court denied the motion but entered sua sponte an order staying the matter pending the outcome of the

[5]This activity formed the basis of an unsuccessful suit by Hoai and the Hemenways under 42 U.S.C. 1983 since the rule governing judge in chambers then allowed such practice without due process. Subsequently the Superior Court changed the rule governing judge in chambers to eliminate this objectionable feature and restrict the judge in chambers.

proceedings in the Superior Court, where Hoai and the Hemenways had, in the meantime, filed counterclaims against Vo, Sun and Vo's colleagues such as Thach.[6]

Hoai then won an interlocutory appeal lifting the stay Hoai v Sun Refining and Marketing Co., Inc. (1989) 866 F2d 1517. Upon remand Hoai moved for summary judgment on liability, relying upon the appellate holding that the consent order was a private and voluntary act between Vo and Sun which did not involve any independent judgment of the Superior Court. Sun, at

[6]Hoai also filed against Vo and Vo's colleagues such as Thach in the Eastern District of Virginia. That suit was dismissed upon motion for want of a showing of pattern of racketeering activity on the basis that the two businesses taken from Hoai, the gas station and a food business in which his wife was active, were taken pursuant to a single scheme. Subsequent appeals to the fourth circuit and a petition to this court were rejected. Cert was denied by this Court just months before its decision in H.J., Inc. v Northwestern Bell Telephone Co (1989) 109 SCt 2893.

the invitation of the court, filed a cross motion supported by numerous documents.

Hoai challenged this Sun motion, particularly with motions directed to striking or disallowing a number of its exhibits. Of particular relevance was Hoai's motion to exclude the so-called contract of sale of the station for a dollar on the grounds that its notations at the bottom made it out to be an altered or composite document on its face, which was in accord with Hoai's story in deposition that he had been compelled under severe threat to sign, and was only shown, the last of the three pages, the other two never having been seen by him until the litigation.

In addition Hoai specifically requested a waiver and/or estoppel of the reliance placed by Sun upon Vo and the alleged one dollar contract inasmuch as Sun had encouraged him to regain the station from Vo, making it clear he would lose his

franchise if he did not, had completely rejected Vo's claims and had in every way confirmed Hoai as their dealer right up to the time when Sun made the deal with Vo to enter the consent order giving the station to Vo in Hoai's stead which was entered September 8, 1986. Further, Hoai, acting in reliance on Sun's representations, had risked his life and the safety of his family in standing up to Vo and Thach, had hired two attorneys and had undergone considerable expense and effort to get his station back at Sun's suggestion.

On October 1, 1990, the district court granted Hoai's motion for summary judgment and denied that of Sun, declaring most, but not all, of Hoai's motions moot. Matters went forward toward a trial on the damages.

Sun filed a motion in limine for determination of damages on November 15, 1990 in which it requested that the

damages be limited to the period from the termination on September 8, 1986 until the end of the franchise agreement term on April 27, 1986, which date, it argued, was the date the franchise was "actually terminated," thus raising for the first time in the case the concept of a false termination versus an actual termination where the termination has been ruled illegal in the first instance.

On December 21, 1990 Sun filed a second motion in limine for evidentiary rulings, asserting that the district court had "already ruled" that Hoai's franchise was improperly terminated on September 8, 1986 and "was actually terminated with notice on April 28, 1986."[7] Sun requested that Hoai's history as an operator of service stations, including his former sun sta-

[7]The record reveals no such ruling and the October 1, 1990 opinion is to the contrary. This illustrates a process of accretion by which Sun was allowed to dictate the law of this case despite the actual law of the case.

tion, be excluded, that the threats against Hoai be excluded, that the counsel for Sun not be recused in order that he might testify as to his role on punitive damages, (proffering, however, that Sun would use advice of counsel as a defense to the claim for exemplary damages pursuant to Eden v Amoco, infra (D Md 1990)) and that the claim for punitive damages be stricken because no evidence had yet been produced. Both motions were opposed.

On February 28, 1991 the district court granted Sun's motion to limit the damages to the period from September 8, 1986 through April 27 [sic], 1987, granting to Hoai the right to develop evidence that the franchise "would have extended beyond April 27, 1986 but for the 'termination' on September 8, 1986." thus wiping out the effect of 15 U.S.C. 2802 (a) and reversing the burden imposed by that section as well

as that imposed upon franchisors by 15 U.S.C. 2805 (c).

Hoai's subsequent motion to alter this ruling in light of the statute's actual language and the burdens it imposes was denied. In denying that motion to alter the ruling the district court ruled that "actual damages" as used in 15 U.S.C. 2805 does not include tortious type damages or anything other than strict contract damages. The district court ruled that Hoai could have pursued tort claims under state law separately, citing O'Shea v Amoco Oil Co. (CA3 1989) 886 F2d 584 and Bellmore v Mobil Oil Corp. (CA2 1986) and that the preemption provisions of 15 U.S.C. 2806 do not exclude tort claims under state law that may grow out of an illegal termination under the PMPA. Hoai should have brought such tort claims separately, the district court held. It also held that the Act did not allow for

damages for emotional disturbance or distress. It also ruled out special damages as sought by Hoai under D.C. law, which allows such damages. The court ruled that Sun was only trying to extricate itself from the dispute between Hoai and Vo.

Hoai moved to have the attorney client privilege waived for Sun's attorneys so that they might be deposed on matters concerning punitive damages. That was denied. Earlier Hoai's motions to depose the principle in-house Sun counsel involved, Jeffrey Wagner, were denied and Wagner was moved by Sun to Tulsa.

Hoai also moved for partial summary judgment to exclude Sun's use of its purported theory, supported by its letters addressed to Hoai but delivered to the station it had given to Vo, that it had "actually" terminated Hoai on April 27, 1987 after it had illegally terminated him on September 8, 1986. It was denied on

the basis that Hoai was responsible for the station even after he was ousted by the consent decree because the Superior Court not Sun had given the station to Vo. Memorandum and Order, June 3, 1991.

On June 6, 1991 Hoai again moved to disqualify Sun's counsel so that he might testify on punitives. It was denied.

In a supplemental pre-trial order on June 28, 1991, the district court invited Sun to file a further motion limiting Hoai's damages to the contract term, speaking of Sun's right to terminate or nonrenew Hoai after the illegal termination of September 8, 1986. This time the court opined that Sun had the right to do this once "it found Hoai enmeshed in his conflict with Vo". However, despite announcing that Hoai might not recover for damages beyond April 27, 1987, the district court, nonetheless, invited Sun to

file another motion on the subject, this time for partial summary judgment.[8]

Again the court restricted damages to what it called contract damages. Declaring it unclear whether there was an actual issue as to punitive damages, the court referred to the "inchoate state of the law on the PMPA at that time" and indicated its doubt in light of that perception, that Sun could have acted in willful disregard of the law (no mention of Hoai's rights under the law) and invited Sun to file a summary judgment motion on the point. In a final move to protect Sun counsel, the court then ruled that Hoai's

[8]It should be noted that Hoai repeatedly opposed these restrictions based not only on the language of the Act itself, but also on local contract law, particularly the prevention doctrine, inasmuch as Sun had created the situation with Vo by switching its allegiance to him which it then used as the excuse for its so-called actual termination or nonrenewal and also the D.C. law that a massive breach of a contract by one party excuses the other from any further obligation to perform. Fowler v A & A Company (DCCA 1970) 262 A2d 344, 348, n.6.

last motion to disqualify Sun counsel J. Gordon Forester would be denied because his testimony would not be relevant to actual damages[9] and because there were four others who could testify about Sun's decision to enter into the September 8, 1986 consent decree which was the illegal termination.[10]

Accepting the invitation of the district court, on July 11, 1991 Sun moved for summary judgment on exemplary damages and Hoai opposed. On July 26, 1991 Sun again moved for summary judgment to limit the damages to the period from September 8, 1986 to April 27, 1987 and was opposed. On September 16, 1991, the district court again granted a Sun motion to limit the damages to the contract term in a further memorandum and order. This memorandum and

[9]Hoai had never contended that it was.

[10]Actually there were two and the only other one who was a Sun employee had been sent to Tulsa, where the court had refused to allow plaintiff to get at him by telephone, Hoai's only practical avenue.

order was that the contract damages would be limited to the period September 8, 1986 through March 27, 1987.[11] It based this decision on 15 U.S.C. 2803, the trial franchise section of the Act.[12]

Trial on compensatory damages began on Monday, October 7, 1991 and continued through Friday, October 11, 1991. At the trial Hoai's lengthy history of operating gas stations, including operating a number of them as an in-house manager or overseer for Sun, was established over vigorous opposition from Sun. Most dramatically evidence from Hoai that he had been paid bonuses for successful operation through Mascot Petroleum, a Sun entity used then

[11]This would appear to be a mistake. All other orders spoke of the term as from September 8, 1986 to April 27, 1987 and that was the term used at trial.

[12]As pointed out earlier, by 15 U.S.C. 2803(b)(1)(B) Hoai, having previously been a Sun dealer in Greenbelt, Maryland, cannot have been, by statutory law, a trial franchisee in the present instance, a point which eluded the district court throughout.

for that purpose among others, belied testimony by Sun employees, the key one of whom had been placed on "leave" pending the outcome of the trial, to the contrary. At the trial also there was uncontradicted and unrebutted testimony that Vo, by comparison, had no knowledge whatsoever or experience of operating a station and working with cars, and did not even know how to check the oil until shown how to do so by Hoai. As at the TRO hearing in the Superior Court, Vo was present at times but in the end declined to take the stand and testify.

The jury awarded Hoai compensatory damages for the remaining term of the franchise in the amount of $65,000. The jury was not allowd to consider damages beyond the contract term or damages for anything other than lost profits. A subsequent motion for judgment NOV by Sun was ultimately denied on May 12, 1992 and the

appeals leading to this petition then ensued.

On October 11, 1994, the last day of trial, Hoai filed his own motion for summary judgment on exemplary damages under the Act, asking for $650,000, or 10 times the jury award. On October 28, 1991 the district court granted Sun's motion for summary judgment dismissing Hoai's claim for exemplary damages and denied Hoai's crossing motion.

In doing so the district court indicated that it was ruling without a trial because plaintiff at the end of the jury trial had indicated through counsel that he would prefer to try the exemplary damages on another day, having just finished the week-long jury trial on exemplary damages. No advance warning had been given that trial of the exemplary damages on that day would be required and indeed, it had been indicated that the matter of exemplary damages

would be tried separately as has been the case in all reported cases.

The district court based its October 28, 1991 decision on the exemplary damages upon motion on Eden v Amoco Oil Co. (DMd 1990) 741 FSupp 1192 and on cases cited in that case, namely this Court's decisions in Trans World Airlines, Inc. v Thurston (1985) 469 US 111 and McLaughlin v Richland Shoe Co. (1988) 486 US 128. "Willful", in the context of the PMPA, the district court held, indicates an "act that is not merely negligent but can be said to have been taken with deliberate or intentional disregard to the requirements of the statute."

The district court also held that an award of exemplary damages under the Act requires a "clear and affirmative showing of a deliberate and intentional act on the part of the defendant.", citing Midwest Petroleum Co. v American Petrofina Maktg.,

Inc. (ED Mo 1986) 644 FSupp 1067, Noe v Mobil Oil Corp. (ED Mo 1980) 503 FSupp 213, and Clark v Mobil Oil Corp. (ED Mo 1980) 496 FSupp 132. The district court then held that there was no such showing by Hoai.

By this time it was calling the September 8, 1986 termination a "de facto" termination" and the purported subsequent termination on April 27, 1987 the "final termination." The district court held that Sun would have continued to deliver fuel to Hoai at his station had he not been removed from it by the Superior Court TRO. It held that Joseph Zulli, the boss at Sun's in-house legal department of Jeffrey Wagner, the attorney who had been sent to Tulsa and kept from being deposed by Hoai, had testified in deposition that Sun was unaware, when it entered into the consent order with Vo on September 8, 1986, that it was terminating Hoai's fran-

chise. In other words, members of the bar may take a franchise from A and give it to B at the expiration of a TRO temporarily awarding it to B and be unaware that they are affecting A. Zulli actually had testified that he knew little about details of the negotiations by Wagner, the Sun attorney who actually conducted the negotiations for the action which constituted the illegal termination.

Wagner was transferred to the Pipeline Division in Tulsa after the onset of this litigation where Hoai, (who could not afford to go to Tulsa to depose Vo) was forbidden by the Court to depose Wagner by telephone. The deposition of Vo's attorney, Roseman, as to the other end of those negotiations, which was on file, made it amply clear that the only concern of Sun in negotiating the deal that led to Vo being substituted for Hoai in control of the station and its branded fuel supply after the entry of the consent order in

the Superior Court without notice to Hoai was how to avoid a follow-on hearing under Rule 65[13] so that Vo might be continued in the station in Hoai's stead. There was no concern for the effect of the PMPA as it related to Hoai as the legitimate franchisee once the TRO had expired and certainly none whatsoever for Hoai's rights under 15 U.S.C. 2802.[14]

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[13]It should be pointed out, because it was never taken cognizance of below despite Hoai's attempts to point it out, that the ruling of the Superior Court judge on the TRO was only on a procedural point. Had Hoai really been a landlord and had he been able to use the summary eviction procedures of the L&T Branch he could have cured the supposed tort introduced into the matter by the TRO judge and, since Vo was given the station, Vo suffered no harm by the supposed wrongful eviction in any case. Had there been a full preliminary injunction hearing there would have been opportunity to demonstrate that Hoai was not a landlord, Vo was not a legitimate franchisee or transferee and that Vo had no right of action against Sun (D.C. Code 10-226(b)) and none against Hoai.

[14]As we have pointed out the district court never seemed to get it straight that Hoai could not have been a trial franchisee under 2803 because he had previously been a Sun dealer in another location.

The district court acknowledged that Sun did, in terminating Hoai, disregard the PMPA, relying on its lawyers in doing so. However, the district court held, the "undisputed facts preclude a finding that Sun acted with 'a consciousness of wrongdoing or with a considered disregard to whether it violated the Act." citing Eden. A good deal of the reasoning behind this opinion is beyond the ken of the petitioner to fathom. But part of the basis was that Sun had relied upon the advice of the lawyers whom the district court had prevented Hoai from using as witnesses. It also inaccurately stated, among other reasons which seem irrelevant to petitioner, as part of the basis of its opinion that Hoai had failed to effectively pursue local remedies.[15]

[15]Hoai had filed counterclaims, moved for judgment and pursued all other remedies in the D.C. Superior Court, a fact which was noted in Hoai v Sun, supra. There has been no effect to these remedies because that court stayed its hand pending the outcome of this litigation.

"Sun's actions", the district court held, "show no considered disregard of the PMPA but rather a practical business judgment in a difficult situation created by others." This would seem to be irrelevant. No mention was made of Hoai's rights under the Act in accordance with its actual language. Siding with a person that Sun acknowledged it knew according to Hoai had threatened to kill Hoai was deemed by the district court to have been "passive" and exemplary damages, therefor, were deemed "inappropriate."

Appeals ensued. The appeals of the compensatory damage issues were joined with those of the exemplary damage issues. Sun cross-appealed on the jury award and the denial of its motion for judgment NOV as well as the summary judgment against it on liability. The appeals court affirmed all

decisions without comment, denied Hoai's petition for rehearing and suggestion for a rehearing en banc and now Hoai makes this petition.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve conflicts in principle among lower courts, and in certain cases, particularly as here, where the appellate court appears to some extent to have avoided tackling the issues by affirming the district court without comment, the writ should be granted where that conflict is exemplified by the decision of the district court as affirmed without comment.

Here there is serious conflict among the circuits on the question of federal preemption by the PMPA under 15 U.S.C. 2806. That conflict was exemplified in the district court decisions here in a manner that also gratuitously wiped out the very core of the PMPA, its creation of

the concept of the "franchise relationship", defined by, but not confined by, the franchise (which is defined as a contract), and eliminated altogether the really signficant lever in the Act for carrying out its intended purpose of levelling the playing field between franchisors and franchisees.

Here the limiting of the type of damages that might be recovered, in light of the unusual circumstances of the case, which was based on the preemption ruling, had the effect of making the concept of the franchise relationship, as assumed in the only real decisions reported on this matter in other circuits, meaningless. We speak particularly of what has become the lead case on "actual damages" under the Act as that phrase is used in 15 U.S.C. 2805(d)(1)(A), Thompson v Kerr-McGee Refining Corp. (CA10 1981) 660 F2d 1380, cert. den. 455 US 1019 (1982). In that

case the franchisor singled out Mr. Thompson and, treating him differently from other franchisors, terminated and non-renewed his franchise, just as was done here. The tenth circuit upheld a jury award based upon Thompson's average income from operating the station previously and then projected it on a reasonable basis over the next six years, which, the tenth circuit confirmed, was reasonable based his then age of 44. The damages were not limited to the contract term. It was recognized that Kerr-McGee's breaking off of its relationship with Thompson was sufficiently complete that it destroyed his business for the next six years.

In the present case the district court allowed Hoai to prove his damages on the basis of his prior operation of other stations, including Sun stations both as a franchisee and an in-house supervisor. The district court, however, did not allow

Hoai to project a reasonable life for his business based on his age, his reasonable expectations and the actual damage that he incurred as a result of the illegal termination and subsequent nonrenewal in the years after the termination and nonrenewal occurred. This puts the decision here in conflict with the 10th Circuit in Thompson as the lead case.

The district court here so limited the damages on no less than three occasions in three different opinions. In one of those opinions, its May 1, 1991, memorandum supporting its denial of Hoai's motion to alter or amend its earlier ruling on this point, it relied on Thompson, supra, id. at 1388 and also on Lippo v Mobil Oil Corp. (CA7 1985) 776 F2d 706, 716 and Midwest Petroleum Co. v American Petrofina Marketing, Inc. (ED Mo 1986) 644 FSupp 1067, 1070. App 41 An examination of Lippo and Midwest Petroleum, however,

reveals that the decision here is at odds with those cases as well. In neither case was the contract term determinative of the time limit placed upon reasonably projected future damages.

In Midwest, a case in the 8th Circuit, the time limitation was created by the fact that the plaintiff had, a year after losing the site, resumed selling oil and gasoline to the airport sites, of which the subject station was one, as a jobber and, after that the plaintiff again starting operating the station through another route. The court reasoned that it would not allow a double recovery and thus limited plaintiff's damages to the period running from when it was illegally deprived of the station until it began to operate a gasoline business in connection with the airport a year later. The contract term had nothing to do with it. Thus the decision in this case is at odds

with that 8th Circuit case as well as with the 10th Circuit case.

The question is closer, however, with regard to the Lippo case and it is there that the theory of the district court in this case is met. For in Lippo there was, as here, a premature illegal termination during the contract term. However, Lippo managed to enjoin Mobil, stay in the station and operate it thereafter. Almost a year and a half later, when his contract term expired, Mobil then legitimately non-renewed his franchise. There was no question of a premature termination so complete that it destroyed the franchise relationship itself beyond repair at that initial stage as is true in the present case.

The district court in this case based its limitation of damages to the contract term on this principle, that a franchisor may terminate or non-renew legitimately

subsequently to a premature termination during the term that is illegal. However, this ignores the most significant difference between the facts in Lippo and those in this case, namely, that in this case Hoai was not able to enjoin Sun and stay in the station. He was given no opportunity to do so whatsoever. Instead Hoai, who was in the process of curing the default of having been ousted from his station so as not to be in it as required by the terms of his franchise, was deprived of his station by a private, voluntary act between Sun and Vo at the end of the Superior Court TRO issued August 29, 1986 which expired September 8, 1986. Had this private agreement not been made by Vo and Sun, entered as an order of the Superior Court and then enforced by Vo against Hoai, then Hoai would have been free to reenter and reoccupy his station just as he had done before. Indeed, with

Vo failing to follow on after the TRO with a full preliminary injunction hearing as the TRO judge had promised Hoai would occur,[16] Hoai would have been free to seek his own injunctive relief against Vo, such as his still outstanding motion to enforce the settlement agreement between himself and Vo to abide by the word of Ernie Peele, the Sun area manager, as to who was Sun's dealer at the location.

Thus, Lippo also fails to support the decision of the lower courts in this case. Because it found, without comment, a legitimate termination and nonrenewal of the franchise almost a year and a half after the initial illegal termination it implies that where the second termination is not legal, the principal limiting damages in

[16]As App. 195 et seq. show, Sun's in-house attorney Wagner was persuaded by Vo's counsel to enter the consent order so that Sun might avoid having to comply with the requirements of Rule 65 for a follow-on preliminary injunction hearing after obtaining a TRO.

Lippo to the contract term would not apply. Thus there is a conflict also between the present case and the 7th circuit in Lippo if there was no legitimate second termination or nonrenewal in the present instance.

In the present case Sun created the problem which it then used as its rationale for supposedly both terminating and nonrenewing Hoai at the end of the contract term, by which time Vo and not Hoai had been in charge of the station for over seven months, with Hoai unable to return to his station for fear of the consent order, which he took to the D.C. Court of Appeals only to have that court opine, after the contract term had expired, that the matter was moot. Thus, this situation is like that proscribed by the 9th Circuit in Pro Sales, Inc. v Texaco (CA9 1986) 792 F2d 1394, where Texaco reduced the credit of the fran-

chisee and then attempted to use the inevitable results of that action to attempt to justify terminating the dealer. This course of action was specifically anticipated and forbidden by Congress in the Act in 15 U.S.C. 2801 (13)(B) which defines "failure" (for which there may be termination or nonrenewal) not to include "any failure for a cause beyond the reasonable control of the franchisee. Here Sun, when it made the deal with Vo to enter into and enter in court the consent decree, placed any subsequent failure of the station beyond Hoai's control. Below Hoai supported this contention with local contract law concerning massive breaches, namely the D.C. "prevention doctrine" and Fowler v A & A Co. (DCCA 1970) 262 A2d 344, 348, n.6.

Thus the decision below here appears to conflict with the only real authority there is on a termination or nonrenewal

which destroys the entire franchise relationship. What is quite crucial and insidious about the present decision is that it robs the concept of franchise relationship as defined in 15 U.S.C. 2801 (2) of any meaning at all. After all, one could have sued for a wrongful termination such as this prior to the passage of the PMPA and obtained damages for the contract term. This is one reason why this Court in this instance, without letting the conflict between circuits develop further, take this case. It is akin to its supervisory power over the courts that is sometimes invoked in issuing a writ of mandamus.

Further, where, as here, a litigant in an emerging area of societal concern, in this case the problem of immigrants struggling with the would be mafias among their ranks, (not only the Vietnamese and other Asian immigrant populations come to mind,

but also the Russians) the supervision of this Court is called upon just as it was during the heighth of the struggle to end segregation. When Hoai began his quest to find a remedy for his wrongs and to right the harm done him by Vo, and ultimately by Sun and others who chose to join with Vo at the crucial moments, the idea that there were Vietnamese preying upon their fellows in the manner he alleged was subject to disbelief and scorn. He was, therefore, never allowed to go head to head with Vo or any of his other tormentors on the merits of his allegations, even as opposing counsel, and ultimately the courts themselves, were preventing him from doing so while asking where was his showing of that which he alleged ?

So that when Hoai sued Vo and Vo's colleagues (but not Sun) under the RICO laws in 1986 he was viewed with great skep-

ticism and the judge in the Eastern District who dismissed the case was openly indifferent to Hoai's allegations of threats of bodily harm and even murder. Such matters caused him to lose interest, he opined while dismissing the case because he found that the two businesses which Hoai alleged he was deprived of, the gas station in question here and another, food business, in Arlington, were taken pursuant to a single scheme and thus no pattern of racketeering activity was shown. This, as we have stated, was before the decision in H. J. inc.

As it turned out, the group that wished to prey upon Hoai and others in this instance, was successful in destroying Hoai's businesses though they may not have been as successful with others as they might have been had Hoai, through his efforts in the courts, not shone a light upon their activities, even though the

courts have been remarkably indifferent to his plight and reluctant to let him get to the merits of his cases. The representation that there is no substance that which he has not been allowed to show is bootstrapping of the most blatant sort.

Only in the interlocutory appeal in this case and his successful jury trial in this case, limited as it was, has he seen the justice system of his new homeland respond to his litigation attempts with anything approaching the promise held out to those who come here. As he had his counsel assert in asking for reconsideration below, when the communists shot his father for being a landlord, at least they gave him a lawyer, listened to his whole story and then shot him. Nothing equivalent to that grant of full process has happened here.

Here is a man who does not rely upon the politics of victimization but who seeks his own way and he finds the courts in-

sensitive to the righteous man who seeks to make his own way and who will stand up against members of his own ethnic group who do not adhere to the American laws. It is time that the concept of civil liberties was integrated with the general laws as applied to enhance individual rights and liberties rather than concepts of bloc politics and a collectivist mentality. There are over 207,000 service stations in America. It is the quintessential small business. No case is reported in which this Court has taken up the issues of the PMPA. This case illustrates just how badly in many instances courts have strayed from the Act's purpose. There are good policy reasons to take this case.

The jurisdiction of this Court to issue the writ of mandamus is sometimes exercised because its supervision is needed. Such is the case here. This case, as may

be seen from the above statement of it, is an unusual one, but that should not be, as it seems to have been below and in related cases, a reason for refusing to apply the law fully. The attitude toward Mr. Hoai and his complaints in this matter was amply illustrated in the opinion in the district court on exemplary damages: he got what the court chose to call a "handsome award" from the jury. The obvious implication is that he should go away satisfied. The law should not be a parceller out of begrudging awards as an entity deigning to give favors, it should be applied fully and fairly without fear of favor. Had Hoai not had a case he should have been the recipient of nothing. Having a case, however, he should have been allowed to present as fully within the confines of the law as the law allows. That did not happen, and the error involved in preventing it from happening

depends in significant part upon assertions of the law which reveal a split in the circuits.

The decision limiting the damages in this case was enabled by the parallel decision concerning tort type damages versus contract type damages and by the district court's decisions concerning estoppel and waiver. All of the district court decisions were affirmed without comment and a petition for rehearing along with a suggestion for rehearing en banc were also denied without comment.

Very few PMPA cases have reached the stage of awarding damages at all. It has on the whole not been a balancer as intended between the superior market power of the refiners and producers and distributors on the one hand and the lesser power of the dealers or franchisees on the other. Even fewer cases have reached the issue of measuring damage to the entire

business damaged, destroyed or taken away as opposed to a question of damages during a period of only a few months in which notice was untimely. But the cases which have reached that stage have taken a position on damages directly contrary to that taken in the present case.

Further, the position on damages in turn relates from the damage section (15 USC 2805) to the preemption question as addressed by 15 USC 2806. There is a split in the circuits on this last important point[17] which is in turn reflected in this case in the damages awarded. Though Sun here joined forces with a man who, with his colleagues, had threatened Hoai as Hoai had informed Sun and as Sun has acknowledged knowing. From that action certain consequences beyond normal lost profits could be expected to flow as a

[17]See "Pre-emptive Scope of §106(a) of Petroleum Marketing Practices Act (15 U.S.C. 2806(a))" 103 ALR Fed 698.

reasonable matter. Here the lower court cut off even special damages which would necessarily flow from the special circumstances, special damages still being a doctrine under D.C. contract law.

Here this was a further undermining of the central purpose of the Act. The phrase "actual damages" as used in 15 U.S.C. 2805 was chosen to embrace all damages other than exemplary damages by Congress. The lower court here, by tortuous reasoning spun its meaning to exclude all but straight contract damages for the contract term. Its limitation to the term of the contract was in part based upon this further spin in contradiction of congressional intent. Hoai's citation to the court of appeals of a D.C. case almost directly on point, Robinson v Sarisky (DCCA 1988) 535 A2d 901, was of no avail. Either the PMPA displaces all local law, including tort law where it overlaps il-

legal termination or nonrenewal under the Act or it does not. If it does not then Congress failed in what it intended to do and the door is open for a host of other claims and counts beyond the PMPA whenever an illegal termination or nonrenwal occurs. This is a point this Court should address.

Further, there appears to be conflict and confusion in the circuits on the application of the doctrines of estoppel and waiver, which are essentially local doctrines of state law and how they affect the questions of damages which arise under the PMPA. This confusion seems to have reached a peak in this case and to have directly affected the outcome in a way incompatible with the PMPA and its underlying purpose. It is hard to imagine how there could not be a waiver or estoppel where a party is encouraged to take back a business from the likes of Vo and his col-

leagues, does so at considerable risk and expenditure of time and resources, has the franchisor then switch sides to that of his tormentor and join with that tormentor in taking the very business he was urged to recover. Yet the district court here based its decision upon a finding that there was no estoppel or waiver here.

Finally, there is here a similar question on the point of the refusal to award exemplary damages and the refusal of them on a summary basis in the face of Hoai's crossing motion. Sunoco, in this case, brutally terminated Hoai's franchise in a manner unparalleled in the reported cases. It not only gave no notice of the termination, it displayed complete indifference to whether or not Hoai had any rights under 15 USC 2802 at all. It encouraged him to fight to get his station back from a man it understood from Hoai to have threatened him with bodily harm and murder

and to have acted in a manner imitative of the mafia.

When he did so and took action to retrieve his station from this individual, one Vo, Sun gave every appearance of standing behind Hoai as its franchisee. Yet when Hoai did retrieve possession of his station and, for his pains, was sued along with Sunoco in the Superior Court of the District of Columbia, Sun, which could have dismissed the suit as against itself at any time on a simple motion, instead, switched sides because Vo was able to obtain a 10 day Temprorary Restraining Order, and, for the purpose of avoiding notifying Hoai so as to not have to have with Vo a follow on preliminary injunction hearing where the impropriety of the TRO could have been exposed under Rule 65 requirements, made an agreement with Vo to give the station and franchise to Vo in lieu of Hoai for the duration of its term.

That this was ostensibly done to be "neutral" until the dispute between Vo and Hoai was over, is an irrelevant semantic game. It was not neutrality, it was switching sides in the middle of the struggle which it had encouraged Hoai to take on, and it was a betrayal of Hoai.[18] Sun waived its rights to stand on any ground other than backing Hoai when it encouraged him to reenter and retrieve his station from Vo. It was also estopped. Yet the lower court denied Hoai's requests for waiver and/or estoppel on this point and the appellate court silently affirmed.

By this action Sun illegally terminated Hoai in violation of the PMPA and did so in a fashion which prevented petitioner Hoai from ever being in a position to have

[18]See App. 195 et seq. for the accurate picture. The picture was muddied extensively by the district court's refusal to allow Hoai to depose attorney Wagner by phone after Sun sent him to Tulsa and by its refusal to allow a bench trial where attorney Forester would have been compelled to testify.

his contract of franchise renewed. The subsequent notices of termination and non-renewal for the end of the term of the franchise agreement which came later were addressed to Hoai but delivered to the premises which had been given Vo by Sun. They faulted Hoai for that which, once the premises and fuel supply were given to Vo, only Vo (as the choice of Sun) had any control over. They did not legitimately cure the deficiencies of the first illegal termination. They were instead self-serving attempts by Sun to limit its damages which were irrelevant in light of the damage already done by Sun and which attempted, under local contract law, to fault Hoai for that which had been created by Sun and the intruder Vo acting together, and to hold Hoai responsible for that, given the massive nature of the illegal termination constituting a breach of the contract of franchise, which he had no

further obligation to pursue, namely the honoring any further of the contract of franchise underlying and defining the franchise relationship. As such they were a cause to award exemplary damages, not a rationale for refusing them.

The way in which the holding on exemplary damages was rendered in this case illustrates that the lower courts, after a promising start in Gilderhus v Amoco Oil Co. (D Minn 1980) CCH Trade Cases 1980-81, Para 63,648 and 77,495 with regard to the use of the single word "wilfull" in an entirely different section of the Act, then have gone far astray from the purpose of the enactment of the exemplary damages provision, where the word "wilfull" was coupled intentionally with the word "disregard" and with the concept of disregard not only of the Act but of the rights of the franchisee thereunder. In following the decision of the Maryland district

court in Eden v Amoco Oil Co., Inc.. (D Md 1990) 741 FSupp 1192, a case where the issue of the meaning of the language as actually used, and particularly the coupling of the words and concepts was not treated, without questioning its flawed underlying premises, the lower courts to date have illustrated that they are following a wrong path, one at odds with an earlier decision of this Court [19]which did couple the concepts of wilfull and disregard, and that a split in the circuits is unlikely to develop in this area because there is now an almost universally wrong opinion based on Eden which no litigant will ever have an opportunity to bring to this Court on the basis of a split in the circuits. Therefore, since this represents an assault on an earlier opinion of this Court and a mistaken following of earlier precedents of this Court (as employed in Eden

[19]U.S. v Illinois Central (1938) 303 U.S. 239, 58 SCt 533, 82 Led2d 773

in connection with wilfull misbranding, a far different concept) where it does not apply, this Court should grant cert on this point and straighten the matter out. It is of sufficient importance to the central thrust of the PMPA with its intent to level the playing field between franchisors and franchisees, that it should be straightened out along with the questions concerning type of damage and length of the time for which damages may be granted. And, like the former questions, it too is effected by questions of waiver and estoppel.

CONCLUSION

For the reasons set out above the writ should be granted in this instance.

Respectfully submitted.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THANH VONG HOAI,
Petitioner,

SUN REFINING AND MARKETING COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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